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Indictment by a Grand Jury

H.L. McClintock

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By H. L. McCLINTOCK*

THE wide-spread concern felt by the public during the decade following the first World War over the defects in the administration of the criminal law, a concern which resulted in the numerous crime surveys of that period, was due largely to the fear that organized crime might prove to be beyond the power of the government to control. Before the results of the surveys, and of other studies in judicial control of crime, could be largely perpetuated in statutory reforms, the fear was to a great degree allayed by the success of the Federal Bureau of Investigation in breaking up organized crime on a large scale; and public attention was diverted from the subject by the economic depression of the thirties and by the present international threat to our security. But the very fact that the subject no longer attracts much public attention makes it a favorable time to study the question more objectively, and the example of the federal government in committing the task of reform of criminal procedure to the courts[1] give greater assurance that such study may be more productive of results than were those undertaken when there was more interest in them on the part of the public as a whole. At the same time, courts and lawyers should be keenly aware that the importance of reform of criminal procedure is just as great as ever. The efforts of the government to protect itself against disloyal conduct during the war will require the best machinery that it is possible to devise to make possible the conviction of the guilty and at the same time to protect the many innocent who will find themselves under unjust suspicion. Also we may anticipate that history will repeat itself, and that the termination of the war may lead in the period of readjustment to a great increase in organized criminal activity which will again put a severe strain upon our law enforcing agencies.

One of the features of our criminal procedure that is very frequently attacked by its critics is the strictness with which the technical rules as to the sufficiency of indictments have been en-

*Professor of Law, University of Minnesota.

[1]Supreme Court Order of Feb. 3, 1941, 61 Sup. Ct. Rep. XIII, pursuant to Act June 29, 1940, 28 U. S. C. sec. 723a.

forced. Sir Matthew Hale's statement in the History of the Pleas of the Crown,[2]

"That in favour of life great strictnesses have been in all times required in points of indictments, and the truth is, that it is grown to be a blemish and inconvenience in the law, and the administration thereof; more offenders escape by the over easy ear given to exceptions in indictments, than by their own innocence, and many times gross murders, burglaries, robberies, and other heinous and crying offenses, escape by these unseemly niceties to the reproach of the law, to the shame of the government, and to the encouragement of villainy, and to the dishonour of God"

has been frequently quoted or expressed in more modern phrase by many recent writers.[3] We have no means of verifying the accuracy of the statement of Hale, and even in our day statistics as to the results of criminal prosecutions are so fragmentary that no definite conclusions can be based upon them, but the fragmentary facts we do have indicate that the number of guilty persons who escape punishment because of technical rulings as to the sufficiency of indictments is far less than is generally supposed. Thus in the American Law Institute's Study of the Business of the Federal Courts,[4] it appears that in the 34,420 cases studied, "pleadings"[5] were filed by defendants in only 1,857, and of the 2,965 pleadings filed only 403, or 13.2 per cent, were motions to quash the indictment or information and 130, or 4.4 per cent, were motions in arrest of judgment, which we may assume were based in many, if not most, of the cases on some claimed defect in the indictment or information. On 1,530, or 51.6 per cent of these pleadings, the ruling was in favor of the United States, and on only 827, or 28 per cent of the pleadings, was the ruling in favor of the defendant. The other pleadings are accounted for under the headings "No entry" or "Other rulings." The study sustains the conclusion that in only a fraction of one per cent of the criminal cases in the federal courts is the indictment held to be defective,[6] and this small fraction undoubtedly

[2]Hale, History of the Pleas of the Crown (1st Am. Ed., 1847) 193. Sir Matthew Hale died in 1676, and his work was published thereafter.

[3]Among many that might be cited are Caruso, The Short Indictment, (1935) 23 Ky. L. J. 362; Perkins, Short Indictments and Informations, (1929) 15 A. B. A. J. 292.

[4]The American Law Institute, A Study of the Business of the Federal Courts (1934) Part I, Criminal Cases, p. 72, and Detailed Tables 15, p. 127 and 17, p. 129.

[5]The term is used to include any motion or paper filed in the case except a guilty or not guilty plea.

[6]Comment, (1937) 35 Mich. Law Rev. 456.

includes many cases where the defect was one of substance and not merely of form.

The survey of criminal prosecutions in selected groups of counties in Illinois[7] led to the conclusion that

"The cases eliminated by discharges by the court, presumably for defective indictments or failure to bring the case to trial within the time required by the statute, were negligible in all of the Illinois groups, except in the seven semi-urban counties, where it reaches 0.93 per cent."

In the supreme court[8] 59 per cent of the cases appealed were affirmed. Of the reversals, only 4.6 per cent were for defective indictment or information. In Missouri, out of 4,969 cases lodged in the circuit court, only 251 were disposed of by action of the court, and of these only 16 were discharged on motion to quash.[9] In the supreme court of that state, of 329 reversals in 745 cases studied, only 28 were for defective indictment.[10] In this connection, it should be remembered that some of the decisions overturning indictments and informations which have been most severely criticized as over-technical, have come from Missouri.[11]

If these three jurisdictions are not entirely out of line with the rest of the country, it would appear that the elimination of all cases where indictments or informations were held defective would have only a negligible effect on the percentage of convictions of criminals. But that does not indicate that a reformation of criminal procedure which would accomplish that result would not be worth while, for the widespread criticism of these cases in both legal and lay discussions of the problem of enforcement of the criminal law shows that the rulings on the sufficiency of the accusation, especially those which are made in the appellate court after the conviction of the accused, occupy a very prominent position in the "show window of the bar,"[12] and a procedural system which would satisfy the public that such rulings fully accorded with the policy behind the criminal law would go far toward re-

[7]Illinois Crime Survey (1929) 211.
[8]Illinois Crime Survey (1929) 117.
[9]Missouri Crime Survey (1926) 167.
[10]Missouri Crime Survey (1926) 223.
[11]See discussion of the Missouri opinions on sufficiency of indictments in Missouri Crime Survey (1926) 234-253. Caruso, The Short Indictment, (1935) 23 Ky. L. J. 362, 369, 370 lists as one of three "famous" cases for technical rulings on indictments State v. Campbell, (1908) 210 Mo. 202, 109 S. W. 807 reversing a conviction for rape on the ground that the indictment concluded "against the peace and dignity of state," instead of "Against the peace and dignity of *the* state" as required by a clause in the constitution.
[12]Stassen, The Show Window of the Bar, (1936) 20 MINNESOTA LAW REVIEW 577.

storing the prestige of the courts in the administration of criminal justice.

Traditionally in our law, an accusation of felony must be made by a presentment or an indictment[13] by a grand jury. Although the grand jury originated as a royal device to extract information from the people of a locality concerning matters of interest to the crown,[14] it had become by the time of the revolts against the Stuart kings an instrument for the protection of the subject against arbitrary accusations by the crown, and it was this function of the grand jury that the framers of the constitutions of most of the original states had in mind when they inserted in those documents provisions for the commencement of felony prosecutions only by indictment of the grand jury, and which led to the insistence on the adoption of the provision of the fifth amendment to the federal constitution that

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger."[15]

This provision is still part of the federal constitution, and similar provisions with more or less extensive exceptions are to be found in most of the state constitutions, though a number of them have no requirement for a grand jury and others permit the system to be regulated or abolished by statute.[16] Wide differences of opinion[17] exist as to the value of the grand jury system in our

[13]A presentment was a charge made by the grand jury on their own initiative, whereas an indictment was brought before them by the prosecuting officer or some other competent party and was voted by them a "true bill." Though both terms are retained in some of our constitutions and statutes, there appears to be no distinction between them today, and this article will follow the usual practice of modern courts to use the term "indictments" to include all accusations of crime preferred in court by a grand jury.

[14]2 Pollock & Maitland, History of English Law (2d Ed. 1898) 641, 649; 1 Stephen, History of Criminal Law (1883) 252-254; Note, (1929) 24 Ill. L. Rev. 319, 320.

[15]United States constitution, amendment V. By Amendment VI accused is entitled "to be informed of the nature and cause of the accusation." It is doubtful whether this requires anything more than would be required by due process, but in any event, no proposed reform of procedure should infringe this right, so no particular discussion of it is called for.

[16]American Law Institute, Code of Criminal Procedure (1930) Commentary to sec. 113, pp. 414-431.

[17]For a discussion of the various arguments for and against the substitution of information by the prosecuting attorney for indictment by the grand jury, written by one who favored the substitution, see Miller, Informations or Indictments in Felony Cases, (1924) 8 MINNESOTA LAW REVIEW 379. A discussion of this problem is beyond the scope of the present article, but many of the proposals for reform of indictments herein discussed could be applied to informations as well.

modern criminal procedure, but in most of the jurisdictions where it is still retained there does not seem to be enough public opposition to it to make its abolition possible; and at this time, when rights of individuals have been completely subordinated to the will of the executive in many countries, and when fears are expressed in our own country that the expansion of the executive power is endangering the rights of the individual, it would be the height of folly to make any attempt to eliminate it so long as any substantial part of the people continue to regard it as a bulwark against executive tyranny. Our concern now is to investigate what reforms in the system are constitutionally possible, and desirable.

In considering the interpretation to be placed on the guaranty of indictment by grand jury in the fifth amendment to the federal constitution, it is interesting to speculate on what would have been the intent of the framers of that amendment with respect to the simplification of the common law indictment with which they were familiar, and which they undoubtedly had in mind when they drafted the amendment. The amendment, with the others making up the federal bill of rights, was demanded by those who feared the power of the federal government created by the proposed constitution, and was insisted upon as a condition to the ratification of that instrument in many of the states. We may reasonably suppose that they would have insisted on the retention of the form of the indictment as they knew it, since they were more concerned with the protection of the individual than with the efficient operation of the government. Other groups in the country who might be expected to be more concerned with the protection of the social order against its enemies, were conservative by instinct and still adhered to many of the old forms. It is, therefore, probable that when it was adopted, the amendment was regarded by everyone as referring to the strict technical indictment of the common law.

But such speculation is of only academic interest, for the legislatures began at an early date to pass statutes which dealt with the worst abuses of the common law rules respecting the validity of the indictment, and such laws are now to be found in every state[18] and in the acts of Congress.[19] In so far as those statutes by their express terms, or by the construction placed

[18]American Law Institute, Code of Criminal Procedure (1930) Commentary to secs. 154, 155, pp. 543-550.

[19]18 U. S. Code, sec. 556.

upon them by the courts, have been limited to merely formal parts of the indictment, they have been held valid, or their validity has been assumed. In the few cases in which statutes prescribing the sufficiency of indictments have been held to violate the constitutional guaranty of accusation by indictment, the courts have considered that they permitted the omission of allegations substantially necessary to charge the crime.[20] We may, therefore, safely assert that the settled construction of these constitutional guaranties is that they permit modification in the form, but not in substance, of the indictment as it was known at common law. That makes necessary an examination of the functions performed by the indictment to ascertain what are the essential elements that must be retained.

Historical research has made it abundantly clear that in the beginning the indictment performed only the function of informing the king's officers of the crimes which had been committed in the jurisdiction from which the grand jury was called. Normally a prosecution for a felony was still instituted by the appeal of the person injured, but for various reasons, not the least of them being the fact that the appellor had to maintain his appeal by personal combat with the appellee, this normal process was not proving effective in many cases, especially since the development of the trespass actions was giving the injured persons a remedy for redress of the wrongs done to them without subjecting them to the risks of an appeal for felony. This limited function of the indictment explains why, until a comparatively recent period, the accused was not given a copy of the indictment, or even permitted to read it, but had to get his knowledge of its contents from hearing it read to him on his arraignment, a rule entirely proper respecting an accusation for the benefit of the king, but totally inconsistent with the later declared purpose of the indictment to inform the defendant of the exact accusation against him.[21]

Before the colonization of America, the indictment had become, in addition to an accusation, the pleading of the prosecution, and was subjected to the strict construction that then applied to all pleadings. The worst features of the strict rules when applied to civil proceedings were alleviated by the statutes of jeo-

[20]State v. Learned, (1859) 47 Me. 426; State v. Mace, (1884) 76 Me 64; Murphy v. State, (1852) 24 Miss. 590; Williams v. State, (1882) 12 Tex. App. 396, Rodriguez v. State, (1882) 12 Tex. App. 552; Brinster v State, (1882) 12 Tex. App. 612.

[21]3 Holdsworth, History of English Law (4th Ed. 1935) 607-623.

fails, but these statutes did not apply to criminal procedure, so that we adopted with the indictment the old rules of strict construction.[22]

The last of the fundamental functions of an indictment, its protection of the citizen against arbitrary action by the sovereign, was inherent in the system from its origin, even though the purpose of the creation of the system was entirely different. But this function attained the importance in public estimation which led to its guaranty in bills of rights during the struggle between the popular party represented by parliament and the Stuarts. The prosecuting officers, and, to only a slightly less extent, the judges, were under the control of the crown, but so long as no prosecution could be begun unless a grand jury voted an indictment, the subject had some protection against arbitrary prosecution, and most of the colonists who settled America came from the opponents of the crown to whom this protection was so important.[23]

It is reasonable, therefore, to conclude that the guaranty of indictment by a grand jury was intended to preserve the existing functions of the indictment as a pleading and as an accusation by a non-official body, based on an adjudication by that body that the accused was guilty of the specific crime for which he was to be placed on trial, and that the second of these functions was regarded as of much greater importance. But neither of these functions can be substantially impaired by statute or court rule without violating the bill of rights.

At common law, a first pleading by the instigator of the proceeding, whether civil or criminal, to be good must satisfy three requirements. First of all it must allege enough facts to show that the court in which the proceeding is brought has jurisdiction of the subject matter and to enable it to render the proper judgment; in a criminal case, it must show that the acts which defendant is charged with committing amounted to a specified crime which the court had power to punish, and that it was committed within the territorial jurisdiction of the court. In the second place, the pleading must inform the defendant of the nature of the charge against him. In the third place, it must form a record from which it can be determined whether a subsequent proceeding is barred by the former adjudication. The common law indictment satisfied the first of these requirements, even

[22]4 Holdsworth, History of English Law (2d Ed. 1937) 531.

[23]Ex parte Bain, (1887) 121 U. S. 1, 7 Sup. Ct. 781, 30 L. Ed. 849; Note, (1929) 24 Ill. L. Rev. 319.

though it wasted a good many words in doing so. No judge with even the minimum of training would fail to recognize the nature of the crime charged, and the indictment was required specifically to allege the county in which the act had been committed. In the seventeenth century, during which Hale wrote, there was an almost complete failure to meet the second requirement. When defendant was not furnished with a copy of the indictment and was not represented by counsel, he got very little information as to the nature of the accusation against him from hearing read a lengthy document which not only was bristling with technical legal terms, but was also all in Latin. Furthermore, the indictment might be actually misleading in some respects. It was required to state the day on which the alleged crime was committed, but a conviction could be sustained if the proof showed another day, so long as the prosecution was not barred.[24] So an indictment for homicide must allege the weapon used, but accused might be convicted though the evidence showed that he used a different weapon.[25] Even today, when the indictment is in English and the accused is furnished with a copy of it, he may still, unless aided by counsel, be unable to understand its meaning. It is not unknown in our modern criminal courts to have defendants ask, after the reading of the indictment, what it means, and to be able to understand perfectly when told it charges that he murdered, or assaulted with intent to murder, John Doe. We also permit convictions where there is a variance between allegations which we say must be included in the indictment so that it will inform accused of the nature of the charge against him and thereby enable him to prepare his defense, and the proof adduced by the prosecution.[26]

The third requirement, that the record protect against a second prosecution, is probably met by the indictment in the great majority of cases, but in most of those cases there is no danger of a second prosecution for the same offense. In those cases where there is such danger, those where there is a question whether several acts of the defendant constitute a single crime, or more than one, or whether one act amounts to several crimes, the record is generally not sufficient to determine the question, and defendant must allege facts outside of the record to support his plea of former conviction or former acquittal. Indeed, the restric-

[24]2 Hale, History of Pleas of the Crown (1st Am. Ed., 1847) 179.
[25]2 Hale, History of Pleas of the Crown (1st Am. Ed., 1847) 185.
[26]31 C. J. 841 and cases cited in n. 4.

tion that the indictment must allege but a single offense, has led some courts often to nullify the protection against double jeopardy by determining whether the offenses for which accused is being prosecuted are the same by the test of whether there could have been a conviction of the present offense under the indictment in the preceding case—which generally results in a decision that the two are separate.[27]

So far the legislatures have seldom attempted to restrict the function of the indictment as an adjudication by the grand jury that defendant is probably guilty of a particular offense for which he should be prosecuted, and any attempt to do so should be nullified by the courts. It may be true, as some studies have suggested,[28] that the grand jury in most cases acts as directed by the prosecuting attorney, but it still has the power to go contrary to his instructions, and probably would do so in any case where public opinion felt that the executive power was undertaking to crush opposition to it by baseless prosecution of its opponents.

This analysis of the functions of indictment by the grand jury suggests the standards for the criticism of past attempts to reform the system, and of proposals for its further modification. In so far as these reforms have been directed against the indictment itself, they have taken the form of either general provisions relaxing the strictness of the common law requirements, permitting amendments to eliminate the freeing of defendants for errors in the indictments, or broadening the common law rules as to the defects that are waived by failure to plead them expressly or cured by the verdict; or else they have undertaken to provide simplified forms which have been declared to be sufficient.

Reforms of the first mentioned type have achieved on the whole a large measure of success. Generally their validity has not been questioned,[29] and when the question has been raised, they have been uniformly sustained. They have failed to attain complete success only because many courts have construed them

[27]Note, (1940) 24 MINNESOTA LAW REVIEW 522, 546.

[28]Morse, A Survey of the Grand Jury System, (1931) 10 Ore. L. Rev. 101.

[29]But see Ex parte Bain, (1887) 121 U. S. 1, 7 Sup. Ct. 781, 30 L. Ed. 849 holding that an amendment of an indictment by striking therefrom matter which might be surplusage violated the constitutional guaranty of indictment by a grand jury. No statute authorizing such amendment was referred to. American Law Institute, Code of Criminal Procedure (1930) Commentaries to sec. 184, p. 583 lists statutes from most of the states permitting amendments of form, and it appears from 31 C. J. 825, nn. 60-64 that such statutes have been almost uniformly upheld.

so narrowly as to nullify much of the good which their advocates intended they should accomplish.[30]

Legislative enactment of specific forms has not been so successful. Where the court has found that the prescribed form fails to allege some particular fact essential to the completion of the crime, the form has been held invalid, either because it fails to inform the accused of the nature of the accusation against him, or because it does not conform to the requirements of an indictment as that term was used in the constitutional guaranty of indictment by a grand jury.[31] In a recent case[32] the New York court of appeals sustained an indictment which, as permitted by statute, merely charged that defendants on a day stated committed murder in the first degree contrary to a specified section of the Penal Law, on the ground that the statute required the prosecuting attorney, on demand by the defendant, to furnish a bill of particulars which became part of the record, and such a bill was furnished in this case. In affirming the conviction in that case, the court said:

"Our decision that in this case the conviction must be sustained where no claim is made that the charge in the indictment of murder in the first degree could have been understood to have any meaning other than a charge of the murder of Ferdinand Fechter, may not be regarded as a judicial approval of the form of the indictment used. It is sufficient here; it might prove in-

[30]"It is somewhat difficult to say what is form, and what is substance, in an indictment. A nice critic might insist that form is substance in a criminal pleading." Lowell, Cir. J., in United States v. Jackson, (D. Mass. 1880) 2 Fed. 500, 502.

[31]State v. Learned, (1859) 47 Me. 426 (statutory form charging possession of liquor failed to allege it was possessed with intent to sell); State v. Mace, (1884) 76 Me. 64 (statutory form for perjury did not allege oath was authorized or required by law); Murphy v. State, (1852) 24 Miss. 590 (form charging barter with slave without consent of master did not give name of slave or master, or specify article sold to slave); Williams v. State, (1882) 12 Tex. App. 396 (indictment for larceny in statutory form insufficient because failing to allege ownership of property, lack of owner's consent and felonious intent of defendant), followed as to same form of larceny indictment in Hodges v. State, (1882) 12 Tex. App. 554; Young v. State, (1882) 12 Tex. App. 614; Insull v. State, (1883) 14 Tex. App. 145. In Rodriquez v. State, (1882) 12 Tex. App. 552 the statutory form of indictment for burglary was held insufficient because it failed to allege the ingredients of the intended felony, simply charging the entry was "with intent to steal." In Brinster v. State, (1882) 12 Tex. App. 612 an indictment charging that defendant, "an adult male, did rape [M] a female" was held insufficient, the court saying: "An indictment is a written statement of a grand jury, accusing a person therein named of some act or omission punished by law." See Note, (1935) 13 Tex. L. Rev. 101 on the validity of the short form of indictment under the Texas constitution.

[32]People v. Bogdanoff, (1930) 254 N. Y. 16, 171 N. E. 890; Note, (1930) 30 Col. L. Rev. 1051.

sufficient in any case where doubt as to its meaning could exist. Whatever form is used, an indictment must still remain a written accusation of a crime by the grand jury. Reasonably precise formulation should render it unnecessary to resort to extraneous proof, yet a faulty formulation of an indictment cannot require a reversal of a conviction unless there is doubt as to the meaning of the indictment."

It should be noted that the facts in that case showed a murder by a gang of three committed during the perpetration of a robbery, and that all three of the defendants had admitted their participation in the crime. The court undoubtedly was influenced in its decision by the fear of the public criticism to which the three dissenting judges referred in their dissenting opinion, but the majority were careful to avoid making the decision a precedent to be followed in less clear cases. Perhaps because of the strict limitations placed upon its decision by the court, the statutory forms are not in common use, at least in New York County.[33]

All discussion of future reform of the indictment, or of any other suggested reform of criminal procedure, should concern itself primarily with the model code of criminal procedure promulgated by the American Law Institute in 1930,[34] since the prestige of the Institute, the extent to which its proposals have been discussed by leading judges and practitioners, and the high reputations of the reporters and their advisers, combined with the evidence of careful study manifested by the commentaries accompanying the Code, furnish assurance that future programs for reform will take the Code at least as the foundation on which to build, even if they do not adopt its provisions in detail.

Chapter 6 of the Code, containing forty-seven sections, is devoted to the regulation of indictments and informations. In so far as these provisions provide for the elimination of needless technicalities of the common law rules regarding criminal pleading, they are above criticism. The best experience of the several states has been gathered together in a very complete and detailed specification of needless requirements, the elimination of which from the accusation is expressly authorized, and there is a very broad general section dealing with defects, variances and amendments which, if accorded its reasonable scope, will prevent the freeing of accused or convicted persons in all cases where it does not appear affirmatively that the defendant was in fact prejudiced thereby in his defense on the merits.

[33]Note, (1939) 53 Harv. L. Rev. 122.

[34]American Law Institute, Code of Criminal Procedure (1930) hereinafter referred to as "the Code."

In the affirmative provisions as to what the indictment shall contain,[35] and in the suggested forms for indictments,[36] the Code adopts the method of reducing the indictment itself to the least possible scope, and providing that its function as a pleading shall largely be performed by a bill of particulars which the court may require the prosecuting attorney to file in any case, and which must be filed in all cases where demanded by the defendant. The commentary to sec. 155 providing for the bill of particulars is joined with that on the preceding section providing the general essentials of an indictment or information. This commentary[37] summarizes the several state constitutional provisions securing to the accused the right to have the nature of the accusation against him stated, but makes no reference to the guaranty of the right to an indictment by the grand jury, whether because those provisions are referred to in a previous commentary,[38] or because those provisions were not thought to be germane to these sections, does not appear. The only discussion of the bill of particulars as such in the commentary[39] deals with the Massachusetts statute, which is substantially the same as the provisions of the Code in this respect, and which has been held to be valid.

The use of a bill of particulars to eliminate the necessity for a specification of all of the elements of the crime charged seems, therefore, to have been adopted with little previous experience. The common law recognized the use of such a bill, granted in the discretion of the judge when the indictment, verbose as it was, might fail to give the defendant enough information as to the nature of the crime to enable him properly to prepare his defense,[40] but such a bill could only supplement the accusation in

[35]Secs. 152, 154.
[36]Sec. 187.
[37]Code, Commentaries, pp. 538-552.
[38]Commentary to sec. 113, p. 414-431.
[39]Pp. 542, 543.
[40]Commonwealth v. Snelling, (1834) 15 Pick. (Mass.) 321, 329 (order requiring defendant to give particulars of proposed defenses to indictment for libel sustained); 3 Encyc. Pl. & Prac. 554. The Massachusetts court said that the need for bills of particulars was less in criminal than in civil because in the former the particulars were generally stated in the record already, but there were some common law indictments that were not sufficient. 3 Holdsworth, History of English Law (4th Ed. 1934) 618 finds the origin of the rules governing the contents of the indictment in the old formal requirements of the appeal for felony and in the analogy to civil pleadings. The explanation, given currency by Hale, that it was in favor of life and for the benefit of defendant, hardly accords with the rule refusing a copy of the indictment to defendant. To attribute to the mediaeval judges a purpose of giving protection to an unlearned defendant, who was

the indictment; it could not supply the averments which the law regarded as essential to a complete accusation of the crime charged. It is astonishing to find so radical a change in our procedure[41] advocated by such a distinguished body without more agitation for it in the discussions of the subject. An examination of the indices to legal periodicals for the period from 1928 to 1937 inclusive reveals that in all the titles of the material listed under the topic "Indictment and Information" a reference to a bill of particulars appears only twice. It is true that most of the discussions of short indictment statutes have some discussion of the provision for a bill of particulars, but even in these discussions there seems to be no clear statement of any benefits that will result from stating the matter essential to the accusation of a crime in two documents instead of in one. The discussions almost all are devoted to the validity of the reform, assuming that it is desirable. The chief advantages of stating the particulars of a crime in a bill of particulars rather than in the indictment itself would be a saving of labor if the defendant did not demand a bill of particulars, as he probably would not in a great many cases; facility of amendment; and greater scope for the application of the doctrine of waiver and aider by verdict.[42]

The first of these apparent advantages is not a matter of very great importance. The time required to draft even a common law indictment for the ordinary felonies would be a very small fraction of the time the prosecuting attorney is required to spend on the entire prosecution. In the cases of prosecutions for such modern statutory crimes as violations of the anti-trust acts, where often the drafting of the indictment involves a great deal of care and labor, it is probable that a bill of particulars would always be demanded so that the saving of labor would again be small.

Since the bill of particulars is furnished by the prosecuting attorney, and not by the grand jury, there would never be any

denied the right of counsel, by requiring the indictment to be phrased in a complicated Latin form whose meaning must be grasped on hearing the document read, is to deny possession of any intelligence. The explanation of Holdsworth makes the system logical, if not just. The protection of the defendant against improper conviction was considered to be one of the functions of the judge. But there is no question that the modern basis for adhering to the old forms is almost always stated to be the requirement that the defendant be informed of the exact charge against him.

[41]"The proposed Code . . . suggests a clear-cut departure from the ancient indictment and information." Perkins, Short Indictments and Informations, (1929) 15 A. B. A. J. 292, 293.

[42]If the prosecution is begun by information, only the first of these advantages would be present.

necessity of referring to the grand jury for an amendment of it, and thereby a great amount of time would often be saved. But the amendment, like the original bill, should be required to fall within the limits of the particular acts which the grand jury had found to constitute the crime charged and that requirement would eliminate much of the chance for free amendment. It would certainly not be proper to permit an amendment at the trial to conform to the proof there adduced, if that proof differed from that heard by the grand jury so that there was no finding by the latter that defendant should be prosecuted for those particular acts.

Whether the courts would permit a substantially greater application of the doctrines of waiver by defendant and cure by verdict to allegations in the bill of particulars than they do with respect to allegations in indictments is doubtful. If the defendant cannot waive the requirement that the prosecution be instituted by indictment,[43] it would seem that he is equally incapable of waiving any essential element of the indictment. Courts have generally applied quite liberally the statutes providing for waiver of formal defects,[44] but any failure to allege the existence of some essential element of the crime, either by indictment or by bill of particulars could not be waived.[45] The same principles would apply to cure of defects in the indictment of verdict of guilty.

These very doubtful advantages from the use of two instruments instead of one are greatly outweighed by the disadvantages. In the first place, the practice is of very doubtful validity. It was adopted in its modern scope in Massachusetts early enough to give us a fairly extensive line of cases dealing with it. The earliest statutes seem to have dealt with a few designated crimes and, after those acts were held to be valid,[46] the legislature adopted the practice for all of the usual crimes.[47] None of these statutes have been held to be invalid, but the attack on them has almost

[43]People ex rel. Battista v. Christian, (1929) 249 N. Y. 314, 164 N. E. 111, 61 A. L. R. 793; Comment, (1932) 30 Mich. L. Rev. 928.

[44]The numerous statutes referred to in Code, Commentary to sec. 184, 581-588 have been generally sustained when they are expressly or by construction limited to matters of form. 31 C. J. 874, notes 88, 89.

[45]Compare State v. Ostby, (1927) 203 Ia. 333, 210 N. W. 934, 212 N. W. 550, with State v. Delerno, (1856) 11 La. Ann. 648; Newcomb v. State, (1859) 37 Miss. 383.

[46]Commonwealth v. Bennett, (1875) 118 Mass. 443; Commonwealth v. Dill, (1894) 160 Mass. 536, 36 N. E. 472.

[47]Commonwealth v. MacDonald, (1905) 187 Mass. 581, 73 N. E. 852; Commonwealth v. Jordan, (1911) 207 Mass. 259, 93 N. E. 809, affirmed 225 U. S. 167, 32 Sup. Ct. 651, 56 L. Ed. 1038; Commonwealth v. Farmer, (1914) 218 Mass. 507, 106 N. E. 150.

always been based on the guaranty of a written accusation stating the nature of the crime charged, rather than on the guaranty of indictment by a grand jury, and the courts of Massachusetts have not yet considered a case where there was a claim that the particulars set forth by the prosecuting attorney in the bill of particulars were not the same as those on which the grand jury based its charge. If the prosecution cannot use its powers of amendment of the indictment to conform to the proof in such a way as to make the indictment refer to particular acts which did not appear to be the basis of the original charge of the grand jury,[48] it would seem to be equally true that it cannot set out any particulars which appear to differ from those on which the grand jury acted. The New York court in its opinion[49] sustaining a short form indictment under its statute on the ground that the bill of particulars gave the defendants the information they were entitled to as to the nature of the acts constituting the crime, was careful to limit its decision to the facts of that case where there was, and could be, no claim that the acts set forth in the bill of particulars differed from those on which the grand jury found the indictment.

The Iowa court has, likewise, sustained a statute adopting in substance the provisions of the Code. In the first case in which the question was raised,[50] the objection to the validity of the statute was based solely on the guaranty of the right to know the nature and cause of the accusation. In the other,[51] the statute was also alleged to violate the guaranty of indictment by a grand jury, and the court relied on *People v. Bogdanoff*.[52] In neither case was there any contention by counsel, or suggestion by the court, that the bill of particulars did, or might, specify acts which were not made the basis of the action of the grand jury in voting the indictment. On the other hand, a strong argument has been made that the provisions of the Code would conflict with the guaranty of indictment by a grand jury in the fifth amendment of the federal constitution, as that guaranty has been construed by the courts of the United States.[53] Thus, while it seems to be pretty well settled that the function of the indictment as a pleading, including information to the defendant of the nature and cause of

[48]Ex parte Bain, (1887) 121 U. S. 1, 7 Sup. Ct. 1, 30 L. Ed. 849. See note 29, supra.

[49]People v. Bogdanoff, (1930) 254 N. Y. 16, 171 N. E. 890.

[50]State v. Henderson, (1932) 215 Ia. 276, 243 N. W. 289.

[51]State v. Engler, (1933) 217 Ia. 138, 251 N. W. 88.

[52](1930) 254 N. Y. 16, 171 N. E. 890.

[53]Comment, (1937) 35 Mich. L. Rev. 456.

the accusation against him, can constitutionally be transferred at least in part to a bill of particulars, furnished by the prosecuting attorney, it is not so certain that its function of expressing the finding of the grand jury as to the particular acts of defendant which amounted to the crime charged can be so transferred.

Can the court constitutionally hold that the bill of particulars prima facie sets out the facts on which the grand jury acted, especially in those jurisdictions which do not require the minutes of the grand jury proceedings to be kept and made accessible to the defendant?[54] To do so would in many cases make the right of the accused to have the grand jury pass on the question whether he should be accused of certain specified acts a purely technical one and thereby deprive him of the substance of the guaranty. On the other hand, if we hold that the guaranty requires that the state be able to prove in every case that the particulars set out in the bill are the same as those on which the grand jury acted, we clearly are introducing into many prosecutions a new question, rather than eliminating any pre-existing one, and a question whose solution will often involve an amount of time and effort out of all proportion to the slight benefits that may accrue from the use of the bill of particulars as a substitute for a specific charge in the indictment.

But even if it be determined that the bill of particulars may be used to perform this function of the grand jury indictment, the wisdom of adopting that method is still not clear. On the face of it, it seems to be absurd to simplify procedure by providing that allegations which are essential to a record which will sustain a conviction, shall be contained in two pleadings, instead of one as formerly. This prima facie absurdity can be overcome only by a clear showing that the separation of the allegations will result in benefits that outweigh the manifest disadvantages necessarily involved in the correlation of two distinct documents. The general use of the practice in jurisdictions where there is a constitutional guaranty of an indictment by a grand jury will inevitably lead to a great many questions as to the identity of the charges in the two instruments, especially in those cases where the crime is a continuing one, or one that has been repeated on different occasions. In those cases the accused has a clear constitutional right to be tried only for the particular acts of which the grand jury accused him

[54]Defendant has such access to the minutes in Iowa, See Comment, (1934) 19 Iowa L. Rev. 628.

when the indictment was voted, and the determination of which of several acts was made the basis of the charge will not be an easy one. In jurisdictions where the short form of indictment, with a bill of particulars granted to defendant as a matter of right, is permitted by statutes which have been held valid, it is not a uniform practice for prosecuting attorneys to use that procedure. It was not adopted by the Commonwealth in the prosecution of Sacco and Vanzetti for murder in Massachusetts, a case where we might suppose those in charge of the prosecution would be especially careful in their procedure because of the widespread interest in the case.[55] It is not followed by the district attorney for New York County in the drafting of model forms of indictments for use in that office.[56]

On all of these considerations, it would be better to eliminate from any proposed reform of criminal procedure the Code provisions for the use of the extreme short form of indictment, a form which fails to conform to the minimum substantial requirements of a constitutional indictment, when considered by itself alone.

The provision of the Code[57] that where the offense is one which is divided into degrees, the indictment need only charge that defendant committed the offense, without specifying the degree, is another provision that does not appear to be in conformity with the spirit of the constitutional guaranty of the right to an indictment by a grand jury. In this provision, the Code is supported by most of the cases,[58] even where there is no statutory provision to that effect.[59] The reason most frequently given for this result is that the indictment is sufficient at common law to charge that offense and that the statute dividing the offense into separate degrees merely affects the punishment, not the nature of the offense. But

[55]Commonwealth v. Sacco, (1926) 255 Mass. 412, 151 N. E. 839. The indictment is not set out in the opinion, but the court, in commenting on the motion for bill of particulars which was made but not ruled upon by the trial court, stated the indictment was good as a common law indictment and sufficient to apprise defendants of the nature of the charge without a bill of particulars. The indictment is set out in Riddell, The Sacco-Vanzetti Case from a Canadian Viewpoint, (1927) 13 A. B. A. J. 683, where it is contrasted with the short form that would have been used in Canada. There is no indication in the article that the author is aware that the statutes of Massachusetts permitted the use of a form similar to that of Canada.

[56]Note, Streamlining the Indictment, (1939) 53 Harv. L. Rev. 122.

[57]Sec. 180.

[58]See, for examples, Graves v. State, (1883) 45 N. J. L. 203, affirmed (1883) 45 N. J. L. 347, 46 Am. Rep. 778; State v. Cole, (1893) 132 N. C. 1069, 44 S. E. 391.

[59]The statutes on this subject are collected in Code, Commentary to sec. 180, p. 579.

in many cases it is largely a matter of accident whether the legislature chooses to modify the common law definition of a crime and create a new offense which will include the acts eliminated from the common law definition, or whether it will call the different forms of the former offense different degrees of the same offense. A rule which would say that in Minnesota, where sexual intercourse with a girl under the age of consent is a separate statutory crime known as carnal abuse of children,[60] defendant is entitled to have the indictment against him allege those facts as they are, whereas in other jurisdictions where the same act is made a lower degree of rape, an indictment need not give him that information, is not one which would be easy to sustain in the minds of intelligent laymen. Generally, the determination whether the different acts constitute different offenses or different degrees of the same offense depends on purely historical reasons. In most jurisdictions there is much less difference in both legal consequences and moral condemnation between the highest degree of manslaughter and the lowest degree of murder, than there is between the different degrees of murder.[61] If, as is frequently the case, the right to release on bail depends on whether defendant is indicted for first or second degree murder, a rule that a grand jury may use one form of indictment for either permits the refusal of bail in cases where the grand jury found that an accusation for first degree murder would not be proper under the evidence. While most of the archaic rules of the common law respecting indictment hamper the prosecution, and, therefore, the advocates of reform have directed their attention primarily to the problem of making the prosecution more effective, any consistent reform program should also eliminate those few cases where the conservatism of the judges has perpetuated rules unjust to defendants.

If this study of the problem of reform of the content of the indictment is sound, it leads to the conclusion that any program for reform of such content should begin with a survey of the decisions of the particular jurisdiction construing the statutes

[60]Mason's Minn. 1927 Stats., sec. 10,125.

[61]Mason's Minn. 1927 Stats., sec. 10,070 defines third degree murder as homicide by an act eminently dangerous to life and evincing a depraved mind or in commission of a felony, and provides as punishment imprisonment for 7 to 30 years, as against life imprisonment for first degree murder. Sec. 10,074 defines manslaughter in the first degree as a killing in the commission of a misdemeanor affecting the person or property of another, or in the heat of passion by cruel or unusual means or the use of a dangerous weapon, and sec. 10,077 provides that the latter crime shall be punished by 5 to 20 years in the penitentiary. Thus it is possible to inflict a heavier penalty for first degree manslaughter than for third degree murder.

already in effect in that jurisdiction,[62] and should adapt to the needs of further enactment, to meet deficiencies revealed by such a survey, the provisions of the Code governing the content of the accusation, except in so far as those provisions are based on the proposal to make the bill of particulars perform some of the functions which have theretofore been regarded as those of the indictment proper. It is not clear beyond controversy that forms for indictments should be prescribed either by statute or rule of court. The advantage of having an authoritative declaration that a stated form is sufficient, may be offset by a tendency of the courts to hold that, if the use of that form is attempted, there must be a strict compliance with the stated language. If the general requirements of an accusation are prescribed, a prosecuting attorney should have little difficulty in drafting a charge to meet his particular situation without involving any great degree of danger that it will be held to be invalid.

But even if we succeed in adopting perfect provisions governing the contents of indictments and in prescribing forms which can be adapted by prosecuting attorneys who have only ordinary ability to perform their duties to meet the various situations that may arise, we will not have eliminated the most serious grounds for criticism of the law's technicalities, those based on the cases where the defendant has been convicted of a crime, often a heinous one, and perhaps after a lengthy trial which has imposed a financial burden on the county and a burden of time on those who have had to participate in it, and where the conviction is then set aside, either by the trial court on motion in arrest of judgment, or more often by the appellate court, for some trivial objection to the indictment which the defendant did not regard as important enough to raise before the trial. Many of these objections are based on mistakes which are purely typographical or clerical errors.[63] While the opportunity for such errors will be reduced by the shorter form at least in the proportion by which the length of the instrument is reduced, it is inevitable that such errors will occur, and any program for procedural reform should

[62]An ideal illustration of such a study is Perkins, Abridged Indictments and Informations, (1927) 12 Iowa L. Rev. 209. Professor Perkins became one of the Advisers to the Reporters of the Code after the chapter on indictments and informations was drafted according to the title page of the Code, but he supported the provisions of that chapter in his article on Short Indictments and Informations, (1929) 15 A. B. A. J. 292. The district attorney of New York County has performed a similar task for New York. Note, Streamlining the Indictment, (1939) 53 Harv. L. Rev. 122.

[63]See the cases discussed by Caruso, The Short Indictment, (1935) 23 Ky. L. J. 362; Missouri Crime Survey, (1926) 245.

undertake to minimize the effect of such errors to the greatest extent possible. At common law objection to the sufficiency of the indictment could be raised before trial either by demurrer or by motion to quash, and after trial by motion in arrest of judgment. Since the demurrer had in criminal cases, as in civil cases, the effect of a conclusive admission of the truth of the facts well pleaded, so that if it was overruled the court could immediately pronounce final judgment and sentence, it was very little used. As long as defendant was not permitted to see the indictment and only heard it on his arraignment, and was then not represented by counsel, there was very little opportunity for the motion to quash. Perhaps for this reason, the courts were very lenient in permitting objections to the indictment to be first raised after verdict of guilty by the motion in arrest of judgment, at which time he might be for the first time advised by counsel. This practice is expressly preserved in Texas by a statute which provides that the motion in arrest of judgment shall be granted upon any ground which may be good as an exception to the indictment for any substantial defect therein.[64] But in most jurisdictions there are statutes which purport to limit the scope of attack upon the indictment by motion in arrest of judgment,[65] and in three states it seems to be the statutory rule that the judgment cannot be arrested even for the failure of the indictment to charge an offense.[66] In addition to these formal pleadings to raise objections to the sufficiency of the indictment, it is sometimes the practice to raise them at the trial, after the jury has been sworn by motion,[67] or by objection to the introduction of any evidence on the ground that the indictment does not charge any offense.

The Code makes no mention of demurrers to the indictment, nor of objections to evidence because of defects in the indictment, but it does provide for motions to quash before trial[68] and for motions in arrest of judgment after trial.[69] One of the grounds for either motion is that the indictment does not charge the commission of an offense. Any restriction upon the common law

[64]Tex. Rev. Cr. Stat. 1925, Cr. Pr. Art. 763. The following article provides that no judgment shall be arrested for want of form, but frequently these typographical and clerical errors, if they cannot be corrected or disregarded, make the indictment defective in substance, not merely in form.

[65]Code, Commentary to sec. 369, pp. 1071-1076.

[66]Maryland, Massachusetts and Rhode Island.

[67]It was so raised, apparently for the first time, in the case in which the New York short-form act was held valid. People v. Bogdanoff, (1930) 254 N. Y. 16, 171 N. E. 890.

[68]Code, sec. 210.

[69]Code, sec. 369.

rules as to the kind of defects that may be taken advantage of upon either motion must be read into the provision from other sections. In view of the long history of the practice of permitting a wide range of objections to be urged on the motion in arrest of judgment, and of the gross miscarriage of justice which so frequently results when a convicted man is able to escape punishment by raising a technical objection to the indictment for the first time after the verdict has been rendered,[70] it would be wise to limit the broad ground of attack on the indictment by motion in arrest of judgment expressly to those objections which have not been waived or cured by the verdict. Though the Code has broad provisions limiting the nature of defects which will invalidate indictments and providing for the amendment thereof,[71] it apparently makes no provision for waiver of objections or cure by verdict.[72] It does provide that failure to move to quash shall be a waiver of all grounds of a motion to quash except those which are also ground for a motion in arrest of judgment, but that section can have no effect on objections to the sufficiency of the indictment, since any basis for attack on the indictment by motion to quash may also be made the basis of a motion in arrest of judgment.

There are cogent reasons why the requirements necessary to sustain an indictment against an attack made before the case goes to trial should be more strict than those necessary to sustain it against an attack made first at or after the trial. In the first place, the effect on the efficient administration of criminal justice in the case of the successful attack before trial is very much less than if the attack is successfully made after trial. In the former case, the most serious consequence that can follow is the resubmission of the evidence to another grand jury for a new indictment. If the grand jury which found the indictment is still in session, it can amend the indictment without hearing the evidence again. In the second place, the attack before trial is more apt to be based on a real opinion of defendant or his counsel that the defect will

[70]The objection that the indictment concluded "against the peace and dignity of the State of W. [instead of "West"] Virginia," was first made after trial and sustained. Lemons v. State, (1870) 4 W. Va. 755.

[71]Code, secs. 184 (1), (2).

[72]Code, sec. 184 (4) provides that no motion made after verdict based on any defect in the indictment shall be sustained unless it is affirmatively shown that the defendant was in fact prejudiced thereby in his defense upon the merits; but that allows the court no more latitude to sustain a motion in arrest of judgment than it would have to sustain a motion to quash for a similar defect, when the indictment or bill of particulars could be amended without harm to the prosecution, unless defendant is granted a continuance under sec. 184 (3) because the defect prejudiced his defense.

prejudice him in making his defense. Studies of the operation of our present system of criminal procedure show that attacks on indictments before trial are rare.[73] If the defendant is held in jail, he is generally as anxious as the prosecution for an early trial and will not file a motion to quash which will result in delaying the trial unless he thinks that thereby he will obtain an advantage great enough to offset the delay. If he is out on bail, but thinks that he has a good chance of winning a verdict of acquittal, he is also generally anxious to have the trial over with so that he may be freed of the charge hanging over him. The relatively small number of cases where the defendant has no hope of acquittal, and ample funds to enable him to resort to delay in the hope of wearing out the prosecution, should not cause the adoption of a rule which may sometimes deprive the defendant of information which is of value to him in preparing his defense, and to which he is entitled under the common law and the constitution.

But these reasons do not apply with anything like the same force to objections which are made after the case goes to trial. The defendant is, or may be, in all cases represented by counsel and is furnished with a copy of the indictment. If he prefers to plead to the indictment as drawn rather than to make specific objection to it, the law accords him that privilege, but he ought not thereafter to expect the court to say that he was mistaken in his choice, that he was prejudiced by the defects he thereafter points out in the indictment. Certainly, after the trial has begun, there is no reason favoring the objection that compares with the social injustice that results from nullifying expensive and laborious proceedings that have been undertaken and often carried through on the strength of defendant's apparent satisfaction with the charge. Any rule of procedure on this subject ought to provide that failure to raise an objection before trial operates as a waiver of all objections that constitutionally can be waived.

Many courts have been unnecessarily strict in limiting the objections that can constitutionally be waived. Any right that is given for the defendant's own protection, he ought to be permitted to waive, but many courts have held otherwise. The present tendency seems to be to permit a more liberal application of the doctrine of waiver to constitutional rights.[74]

[73]Illinois Crime Survey (1929) 211; Missouri Crime Survey (1926) 167; supra, notes 7, 9.

[74]See, for example, cases dealing with waiver of right to trial by jury. Code, Commentaries to sec. 266, p. 810.

The guaranty of indictment by grand jury is not stated in the form of a right granted to the defendant, but of a prohibition of action by the court until there has been such an indictment, and such indictment has, therefore, been held to be a jurisdictional requirement,[75] and it is fundamental that a party cannot confer jurisdiction on the court by waiving an objection that would defeat such jurisdiction. But it does not necessarily follow from the principle that an indictment is essential to the court's jurisdiction, that the defendant cannot waive any objections to it except those which are purely formal. When a motion is made to quash the indictment for defects therein, the only proceedings from which the court can determine whether there has been an indictment by a grand jury charging the particular acts which constitute a crime over which the court has jurisdiction is the indictment itself. After the trial, the court has, in addition, the acceptance of the indictment by the defendant and often much evidence received at the trial which identifies the crime as that for which the indictment was found. There is no reason why the court may not take this additional material into account in determining whether there was an actual indictment by the grand jury charging the particular crime for which the defendant was subsequently convicted. To do so, is not to say that the parties can confer jurisdiction on the court, but merely that a jurisdiction that always existed in fact, but which was not properly established by the record in the beginning, has now been established by subsequent proceedings had with defendant's consent, so that the court may now disregard omissions from the indictment which have been supplied by the later proceedings. It, therefore, ought to be permissible to adopt a valid statute or rule to the effect that defendant's failure to object to the indictment before trial should operate as a waiver of any objections that the indictment failed to give him sufficient information as to the offense charged, and also waiver of all objections that it failed to show a finding by the grand jury that he should be prosecuted for the particular acts constituting the crime for which he was convicted, if the subsequent proceedings in the case enabled the court to determine that the grand jury had in fact intended to charge the commission of those acts.

The provision of the Code that no variance between the allegations of the indictment and the evidence in support thereof shall be a ground for acquittal, but that the indictment may be amended

[75]People ex rel. Battista v. Christian, (1929) 249 N. Y. 314, 164 N. E. 111, 61 A. L. R. 793.

to conform to the evidence,[76] quite clearly violates the constitutional guaranty in all of those cases where there is nothing to show that the grand jury had in mind in finding the indictment the facts as they appeared by the evidence at the trial, rather than those they stated in the indictment. It should be qualified so as to eliminate those cases.

The result of this study may be summarized as follows:

(1) The indictment by grand jury incorporated in our constitutional guaranties contemplates that the formal document returned into court shall perform the functions of expressing the finding of the grand jury that the evidence heard by it warrants the state in placing the defendant on trial for the specified crime, committed by the particular acts set forth therein; and of the initial pleading of the prosecution in the case by informing the court of the crime charged so as to enable the court to determine that it has jurisdiction, and by informing the defendant of the nature of the accusation against him to enable him to prepare his defense.

(2) That these functions can better be performed by a single indictment, than by a combined indictment and bill of particulars.

(3) That modern criminal procedure should provide for the plainest and simplest language which will secure the performance of these functions, and for the most liberal amendments that are possible under the constructions placed on the applicable constitutional provisions, so long as those amendments do not change the charge to one which the grand jury had not voted in finding the indictment.

(4) That the greatest evil connected with existing rules as to the validity of indictments is that they permit defendants to speculate on the verdict, and, if they are found guilty, then permits them to escape the consequences by raising for the first time objections to the indictment; and that it should be provided that failure to object to the indictment before trial shall operate as a waiver of all objections to the indictment so far as such waiver is constitutionally permissible, and that the constitutional guaranty should, for this purpose, be construed to create a privilege for defendant which he may waive, except in so far as it may affirmatively appear that the defendant was convicted of a crime other than that of which he was accused by the grand jury.

[76]Code, sec. 184 (2).